



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 12, 2005

Mr. Juan J. Cruz
Escamilla & Poneck, Inc.
Attorneys and Counselors
5219 McPherson, Suite 306
Laredo, Texas 78041

OR2005-03107

Dear Mr. Cruz:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 221937.

The United Independent School District (the "district"), which you represent, received a request from the State Board for Educator Certification ("SBEC") for specified categories of employment information concerning a named former district employee, including (1) reports, notes, statements, or memoranda that reflect a chronology of the conduct reported or the district's investigation of the incident; (2) the employee's application for employment and any documents submitted in support of the application; (3) any information that evidences administrative reprimands or other disciplinary measures; (4) any documentation relating to the employee's employment; (5) the employee's teacher service record; and (6) any other document that may be relevant to SBEC's investigation of the employee.

You state that the district has no information responsive to categories 1, 3, and 4. We note that the Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986). You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by other statutes. You raise section 552.101 in conjunction with section 21.355 of the Education Code. Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). In that decision, we determined that the word "teacher," for purposes of section 21.355, is a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id* at 4. We also concluded that the word "administrator" in section 21.355 means a person who is required to and does in fact hold an administrator's certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You state that the information in Exhibit B consists of teacher and administrator evaluations. Assuming that the individual who is the subject of this information held a teaching certificate or permit or an administrator's certificate under subchapter B of chapter 21 of the Education Code and was performing the functions of a teacher or administrator at the time of the submitted evaluations, we conclude that the information in Exhibit B is confidential in its entirety under section 21.355 of the Education Code and must be withheld from disclosure under section 552.101 of the Government Code.

Next, section 552.101 also encompasses information made confidential by statute. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Tax return information is defined as data furnished to or collected by the Internal Revenue Service with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. *See* 26 U.S.C. § 6103(b). The submitted W-4 form is tax return information and must be withheld unless release is authorized under section 6103(c). *See* 26 U.S.C. § 6103(c) (providing for release of tax return information).

Next, we address the district's privacy arguments for information contained in Exhibits C, D, and E. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section

552.101. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we will consider your section 552.101 and section 552.102(a) claims together.

For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

Prior decisions of this office have determined that some kinds of medical information and personal financial information not related to a transaction between an individual and a governmental body are protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992) (personal financial information not related to transaction with governmental body generally not subject to legitimate public interest), 470 (1987) (information pertaining to illness from severe emotional and job-related stress protected by privacy), 455 (1987) (information pertaining to prescription drugs, specific illnesses, procedures, and physical disabilities protected by privacy). However, this office has also determined that the essential facts about a financial transaction between an individual and a governmental body generally are subject to a legitimate public interest. *See* Open Decision Nos. 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy), 523 (1989). Based on your representations and our review of the submitted information, we conclude that the information we have marked is protected from disclosure under the common-law right to privacy and must be withheld under sections 552.101 and 552.102 on that basis. *See* Open Records Decision Nos. 470 (1987) (public has legitimate interest in job qualifications and performance of public employees), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

Section 552.102(b) excepts from disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee." Gov't Code § 552.102(b). This section further provides, however, that "the degree obtained or the curriculum on a transcript in the personnel file of the employee" are not excepted from disclosure. Thus, except for the information that reveals the degree obtained and the courses taken, you must withhold the transcripts that we have marked under section 552.102(b)

Next, we address the applicability of Section 552.117(a)(1) to portions of the remaining submitted information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential pursuant to section 552.024 of the Government Code. Whether information is protected by section 552.117(a)(1) must be determined at the time that the request for it is received by a governmental body. *See* Open Records Decision No. 530 at 5 (1989). Thus, the district may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received by the district. The district may not withhold such information under section 552.117(a)(1) for an employee who did not make a timely election to keep the information confidential. Accordingly, we conclude that the district must withhold the portions of the remaining submitted information that we have marked under section 552.117(a)(1) of the Government Code provided that the current or former employee with whom the information is associated timely elected under section 552.024 to keep that information confidential.

We note, however, that if the former employee did not timely elect to keep her social security number confidential pursuant to section 552.024, the social security number may be confidential under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number in the submitted documents is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing the former employee's social security number, the district should ensure that the social security number was not obtained or maintained by the district pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, assuming that the individual who is the subject of the evaluations held a teacher's certificate or permit or an administrator's certificate and was performing the functions of a teacher or administrator at the time of any of the submitted evaluations, any such evaluation is confidential under section 21.355 and must be withheld from the requestor under section 552.101 of the Government Code. The district must withhold the W-4 form under section 552.101 in conjunction with section 6103 of title 26 of the United States Code. The district must also withhold the information we have marked under sections 552.101 and 552.102 and common-law privacy. Except for the information that reveals the degree obtained and the courses taken, the district must withhold the transcripts that we have marked under section 552.102(b). If the former employee at issue timely elected to keep her

home telephone number, social security number, and family member information confidential, the district must withhold this information under section 552.117(a)(1) of the Government Code. Nevertheless, her social security number may be confidential under federal law. All remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

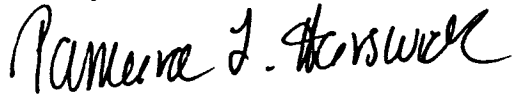
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Tamara L. Harswick". The signature is fluid and cursive, with the first name "Tamara" being the most prominent part.

Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 221937

Enc. Submitted documents

c: Mr. Juan Flores
Staff Investigator
State Board of Educator Certification
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(w/o enclosures)